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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

MAJOR KURT G. SCHELKLE, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether petitioner was denied his Sixth Amendment right to present witnesses in his own defense when the military judge erred, to the prejudice of petitioner, by excluding evidence from defense witness statements that they had never seen or known petitioner to have used drugs.

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The petitioner, Major Kurt G. Schelkle respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Armed Forces entered in his case on September 12, 1997.

OPINIONS BELOW

The order and judgment of the United States Court of Appeals for the Armed Forces, reported at 47 M.J. 110 (1997), is located at Appendix A. The unpublished opinion of the United States Air Force Court of Criminal Appeals, is located at Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces was entered on September 12, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259 (3) (West Supp. 1996) and 10 U.S.C. § 867(a) (West Supp. 1996).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the Constitution of the United States provides in relevant part:

"In all criminal prosecutions, the accused shall enjoy the right to...have compulsory process for obtaining witnesses in his favor . . ."

STATEMENT OF THE CASE

On November10, 1993, contrary to his pleas, petitioner was convicted of wrongfully using marijuana on one occasion, in violation of Article 112a, Uniform Code of Military Justice, 10 USC § 912a. The adjudged and approved sentence was a dismissal.

On September 26, 1995, the Air Force Court of Criminal Appeals affirmed the findings and sentence. (Appendix B).

On February 9, 1996, the Court of Appeals for the Armed Forces granted review on the following issue of law:

> WHETHER THE MILITARY JUDGE ERRED, TO THE PREJUDICE OF APPELLANT, BY EXCLUDING EVIDENCE FROM DEFENSE WITNESS STATEMENTS IN WHICH EACH SAID THAT THEY HAD NEVER SEEN OR KNOWN OF THE APPELLANT TO HAVE USED DRUGS.

On September 12, 1997, the Court of Appeals for the Armed Forces issued its decision, affirming the decision of the United States Air Force Court of Criminal Appeals, holding that the military judge did not err in excluding evidence from defense witness statements in which each said that they had never seen or known of the appellant to have used drugs.

STATEMENT OF THE CASE

Pursuant to a random urinalysis inspection, the appellant was ordered to provide a urine sample on 28 April 1993, which he did. (R. 115). On 26 May 1993, his sample was reported by the Brooks Air Force Base laboratory as positive for the marijuana metabolite THC, at a level of 43 ng/ml. (Pros. Ex. 7). This reading was 28 ng/ml above the Department of Defense (DOD) cut-off level of 15 ng/ml. Subsequently, charges were preferred against appellant on 19 July 1993 for wrongful use of marijuana between the dates of 28 March 1993 and 28 April 1993. (R. 9). Appellant pled not guilty at his court-martial, which began on 8 November 1993.

At the time of appellant's court-martial, appellant had served honorably in the Air Force for over 13 years. Needless to say, the trial was hotly contested.

Prior to questioning of the court-members, the prosecution and defense offered their respective exhibits into evidence. In addition to appellant's Officer Performance Reports and certificates, defense counsel offered Defense Exhibits R-W for appellant's case-in-chief. The exhibits were statements from fellow Air Force members and co-workers. The affidavits generally talked about appellant's good work ethic, his "good military character," and his character for truthfulness. (Def. Exs. R-W). Defense Exhibit R, a statement from Jack Killian, appellant's current father-in-law, stated that he had known appellant for 9 years. He also said "In all my experiences with Kurt Schelkle, I've never known him to use or be in any way involved with marijuana or illegal drugs." (R. 270). Defense Exhibit S, a statement from a civilian co-worker, Bernard Ditano, stated that he had known appellant for 9 years, since 1984. He also said "I have never known Major Schelkle to use illegal drugs, in fact, I haven't even known him to excessively use alcohol." (R. 271). Defense Exhibit T was a statement from a retired Colonel, Mr Pentle. He had known appellant for 9 years, since 1984. In his statement, he stated "I have never observed or known anything that would have led me to believe that Major Schelkle was using or involved in any way with any illegal substance." (R. 271). Defense Exhibit U was a statement from a former Major, Mr Berthelotte. He had known appellant since the late 1970s, a period of approximately 15 years. He stated "Over the years, I have never known Kurt to use marijuana or any other illegal substance." (R. 271). Defense Exhibit V was a statement from another civilian co-worker, Mr Metzger. He stated "In all my contact with Major Schelkle, I have never known him to use or be involved in any illegal drugs." (R. 271). Finally, Defense Exhibit W was a statement from Lt Colonel Buchanan. He had known appellant since 1988. He stated " I have never known Major Schelkle to use or be involved in illegal drugs." (R. 271).

Trial counsel had no objection to the format the evidence was coming in (affidavits) or "to affidavits to military character under the rules of evidence." (R. 42). He also agreed that "Good character generally is a defense to drug use." (R. 43). However, he objected that portions of the witness' statements, as described above, discussed "a specific assertion about a specific act. And it is not a piece of conduct which by itself suggests good character. And I think that that assertion falls afoul of the rules enumerated in MRE 405 which indicate the methods by which character may be proven." (R. 43). The military judge then asked trial counsel about M.R.E. 405(b), which allows specific instances of conduct "where character or traits of character of a person is an essential element of an offense, you're alleging that he wrongfully used marijuana. . . . People are saying that on all other occasions when they observed him, they have not observed (marijuana). "Trial counsel responded that those were not specific instances of conduct relevant to the charged time period. (R. 44). The military judge then asked about law abidingness, stating that "law abidingness is a characteristic. . . ." Trial counsel then withdrew his objection and the military judge admitted Defense Exhibits R-W as written. (R. 45).

During his opening statement, trial counsel told the members that they were going to hear from Special Agent Bill Kelley, who had interviewed the appellant about his positive urinalysis. (R. 99). Trial counsel told the members that there was no confession, however, he asked the members to "listen very carefully to the discussion between SA Bill Kelley and this accused on the 1st of June 1993." (R. 99).

During the defense counsel's opening statement, defense counsel put all parties and the court-members on notice that appellant was going to testify in his own defense:

> Major Schelkle wants a fair trial; he's going to take the stand. And he's going to testify. Major Schelkle is going to talk to you about decisions affecting his cooperation, particularly the pregnancy of his wife. He's going to say he didn't tell his wife about this until about a week ago and why. But he is going to talk about cooperating with OSI and the grueling efforts that he went through to try and figure out how this could have happened. Could it have been something I ate? Did I go to parties? He's going to show you what's been admitted into evidence as Defense Exhibits P and Q, receipts. He checked his Visa accounts. Where did I go between 28 March—28 April 1993? You'll see that Major Kurt G. Schelkle, an officer with outstanding character for military service as based on his performance reports and other exhibits that will be before you, could not come up with any source of ingestion himself. He couldn't figure out had he eaten something and felt funny.

(R. 101).

The prosecution began its case by calling MSgt Colvin, who testified as to the method that servicemembers at Hanscom AFB were randomly selected for a urinalysis. (R. 103–109). Captain Zlotnicki then testified as to how appellant had been notified and the date that appellant provided his urinalysis sample. (R. 114–117). On cross-examination, defense counsel asked her about appellant's demeanor on the date he was ordered to provide a urine sample. (R. 120). She testified that appellant appeared normal. (R. 120). On re-direct, trial counsel attacked her opinion, having her concur that she was "no expert" in being able to determine whether or not a person was under the influence of drugs. (R. 123).

MSgt Skaggs then testified. He was the person who had actually observed appellant urinating into the bottle. (R. 133). The 28th of April 1993 was the first time MSgt Skaggs had ever been an observer. (R. 128). He testified that when appellant arrived to provide his sample, he joked about having to "study for this." (R. 134). MSgt Skaggs did not recall anything out of the ordinary occurring when appellant urinated into the bottle and, on cross-examination, gave his opinion that appellant did not appear to be under the influence of any drugs. (R. 142). Trial counsel had objected to this "opinion" testimony but was overruled by the military judge. On re-direct examination, trial counsel vigorously questioned the opinion of MSgt Skaggs. (R. 144–145). The prosecution then called SSgt Hivner and TSgt Ruiz to discuss how appellant's urine sample was packed and shipped to the Brooks Air Force Laboratory. (R. 149–163). Dr Papa, a forensic chemist, was then called as an expert witness for the prosecution to discuss the testing procedures. (R. 175).

Dr Papa testified about the various effects of marijuana on a user. (R. 181). Trial counsel asked him whether it was possible for a frequent user to have stopped using marijuana on 28 March 1993 and test positive one month later, on 28 April 1993. Dr Papa said it was possible. (R. 181, 182). Dr Papa also stated that a person could use marijuana for years without his or her co-workers knowing. (R. 182). Dr Papa testified that a positive reading of 43 ng/ml could be consistent with an unknowing ingestion , i.e. the person had not felt the effects of the marijuana he or she unknowingly took. (R. 222). However, in his opinion, a person could feel the effects of marijuana but still not have knowingly ingested it. (R. 229). He also stated that a positive result could occur from eating, as opposed to smoking, marijuana, although in his opinion this was not very likely. (R. 221, 237). However, ingesting the marijuana (in food) would normally delay absorption of the marijuana. (R. 243).

Trial counsel also asked Dr Papa a hypothetical question: "Assuming for hypothetical purposes, that the accused used marijuana on a regular basis and stopped on the 29th of March 1993. Could the result in this test be consistent with such behavior?" (R. 218). Dr Papa said it was possible. (R. 218). Trial counsel also asked him if appellant's test result was consistent with the appellant using marijuana between the 28th of March and the 28th of April. (R. 218). Dr Papa said it could be consistent with such use. (R. 218). Finally, trial counsel also asked numerous questions about the "frequent" marijuana user and the one time or casual user. (R. 180–182). As promised by trial counsel, after Dr Papa, Special Agent (SA) Kelley was called as a witness. After appellant's urine sample had been reported positive, appellant was questioned by SA Kelley. (R. 254). SA Kelley first testified about his review of appellant's medical and leave records. Appellant's medical records did not indicate that appellant had been approved to use marijuana for medicinal purposes. (R. 251). His leave records showed he had taken leave on the 15th (Thursday), 19th (Monday) and 26th (Monday) of April 1993. (R. 254, 255).

Appellant was read his rights and agreed to talk to SA Kelley. (R. 256). He was cooperative. (R. 261). Appellant told him he had the "wrong guy." (R. 257). He also said he was against drugs and could not explain how his test had come back positive. (R. 257). SA Kelley then asked appellant about his social habits and whether he went to parties and restaurants. (R. 257). Appellant said he had been with his wife the whole time. Appellant also said he did not recall any problems when he provided his urine sample. (R. 258). Appellant did want to know why the results took so long to come back. Appellant also told SA Kelley that he normally took three day weekends in order to spend time with his family. (R. 259). At the end of the interview he asked that

his wife not be called and also asked for the phone number of the Base Chaplain. (R. 261). SA Kelley did not tell appellant's wife. (R. 265). He also decided not to search his home, however, appellant had consented to a search of his home. (R. 265, 286). Finally, a check of appellant's military records and civilian police records turned up no derogatory information about appellant. (R. 267). During closing argument, trial counsel spoke about the interview appellant had with SA Kelley. (R. 403). He told the court-members how SA Kelley had done a "thorough and even handed investigation." (R. 403). He told the court-members that appellant had never been outraged and have never become angry during the investigation. Further, appellant had asked for the phone number of the chaplain. (R. 404). He even told them to ask themselves why appellant had decided to talk to the OSI. (R. 412). It is clear trial counsel used the testimony of SA Kelley to preemptively attack the credibility of appellant before appellant testified.

On cross-examination, SA Kelley stated that OSI had identified no witnesses who had observed appellant using marijuana between 28 March 1993 and 28 April 1993. No witness had observed appellant acting like he was under the influence of drugs. (R. 264). After the testimony of SA Kelley, the prosecution rested. (R. 270). The military judge again took up the issue of Defense Exhibits R through W because the trial counsel had changed his mind that morning and now objected to the admissibility of portions of the statements (as previously noted). (R. 272).

REASON FOR GRANTING THE WRIT

THE PETITIONER WAS DENIED HIS SIXTH AMENDMENT RIGHT TO PRESENT WITNESSES IN HIS OWN DEFENSE WHEN THE MILITARY JUDGE ERRED, TO THE

PREJUDICE OF APPELLANT, BY EXCLUDING EVIDENCE FROM DEFENSE WITNESS STATEMENTS THAT THEY HAD NEVER SEEN OR KNOWN APPELLANT TO HAVE USED DRUGS.

The standard of review regarding a military judge's admitting or excluding evidence is one of an abuse of discretion. However, conclusions of law are reviewed under a *de novo* standard of review. In this case, appellant contends that the military judge's ruling on the law regarding the excluded defense statements was incorrect.

Upon re-objection by the trial counsel after the military judge had admitted Defense Exhibits R-W, the military judge asked trial counsel the basis of his objection. Trial counsel stated the following:

> While good military character and the character for law abidingness have certainly been established by case laws (sic) to be relevant in a case such as this, the military rules of evidence that have developed over a long period of time have acknowledged the fact that there is a certain method to presenting such evidence. And the method is to lay a foundation for an opinion or reputation and then state it in general terms.

(R. 272).

After a few words with the military judge, trial counsel continued:

> And the basis for my objection is MRE 405—I believe it is b—which prohibits specific instances of conduct to be presented actively to show a character trait. And the only exception it allows is for a case like larceny where honesty is naturally a character trait. And it's an active element of a charged crime

> or there is an affirmative defense, such as entrapment, where the character of a particular individual is an active element of (sic) affirmative defense. And there is no affirmative defense in this case to which lack of drug use or particular times and occasion of specific instance is an element.

(R. 272). Trial counsel was confused, but he convinced the military judge. The military judge stated he was concerned that the providence of the jury not be invaded (as to the ultimate issue). (R. 272). The military judge opined that in an assault case evidence that other witnesses had never seen the accused assault anyone would not be relevant. He also opined that in a drunk driving case, witnesses would not be able to testify that they had never seen the accused drink and drive before or "seen him drunk drive before." (R. 273).

To these concerns, defense counsel responded that a Navy case, Bells, clearly held that character evidence was admissible in drug cases. The judge agreed. (R. 273). She then went on to state:

> Character evidence is allowed and 405b specifically in plain language is that in cases where character or a trait of a character is an essential element and here's where I have a burden here to show that it is an essential element. You can make proof through specific instances of the person's conduct. Now, so what part of the character is an essential element? Well, his character as a good soldier, which we've shown, where good soldiers don't use drugs. So, this is consistent with that good soldier defense which is allowed by case law. Secondly, it's consistent with the defense which we've asserted of unknowing ingestion and the element of the offense of knowledge. So, relating 404a and 405b the defense believes that it is permissible.

(R. 273). The defense counsel agreed that the references to alcohol use should be redacted, since it was not relevant to marijuana use. (R. 273). The military judge then stated that although the defense witnesses could "go into things such as an individual being law abiding," he did not believe that the fact that "someone has never seen him use drugs or over-indulged in alcohol is admissible and I'm ordering the defense to retract those lines. . ." (R. 274).

The military judge abused his discretion because evidence of an appellant's law-abidingness in not using drugs, or having a reputation for not using drugs, or having never been seen using drugs during his life, in a urinalysis drug case, is admissible into evidence under the rules of evidence and the Sixth Amendment to the Constitution. The trial counsel was correct when he stated that case law clearly allows character evidence to be admissible in drug cases. (R. 273). "Few rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers v. Mississippi,* 410 U.S. 303 (1973). Accordingly, rules of evidence, such as hearsay rules, "may not be applied mechanistically to defeat the ends of justice." *Id.*

Certainly, a military member who does not use drugs is showing "good military character." *See United States. v. Vandelinder,* 20 M.J. 41 (C.M.A. 1985) (good military character pertinent to drug charges); A character trait for purposes of M.R.E. 404 is not limited to a moral disposition such as honesty, peacefulness, or truthfulness. To the contrary, Dean Wigmore defines a character trait more expansively-as a moral or psychical disposition. *See United States v. Elliot,* 23 M.J. 1 (C.M.A. 1986). Thus, "lawfulness" has been determined by this Honorable Court to be a character trait within the meaning of M.R.E. 404(a)(1). *Id, citing, United States v. Clemons,* 16 M.J. 44 (C.M.A. 1983). The more difficult question is whether a character trait in question

is "pertinent." *See United States v. Hooks,* 24 M.J. 713 (A.C.M.R. 1987) ("it is the substance of the alleged misconduct which is pivotal to a determination whether such evidence is " 'pertinent.' "). "Evidence is called "pertinent " when it is directed to the issue or matters in dispute, and legitimately tends to prove the allegations of the party offering it." *Elliot, supra,* at 5. One of the pertinent character traits of appellant was law-abidingness, as recognized by all the parties in appellant's case. The "law-abidingness" was that appellant had never broken the law against using drugs. Thus, under the M.R.E. 405(b), the defense could offer specific instances of his conduct which showed he never used drugs, as long as those specific instances of conduct related to his lawfulness in not using drugs.[1] So, for example, he could offer evidence from college friends that he had once been offered marijuana but refused. Such specific instances of conduct had become more relevant in appellant's case after trial counsel had elicited evidence from Dr Papa that a chronic drug user could have stopped using drugs on 28 March 1993 and nevertheless tested positive on the 28th of April. By his questioning of Dr Papa, trial counsel implied that even if no one had seen appellant use drugs between the charged time frame he could have still tested positive if he were a frequent drug user. The defense statements were highly relevant to rebut trial counsel's implication that appellant could be a frequent drug user.

The pertinent statements in the defense exhibits did not refer to specific acts of conduct, assuming specific acts of conduct would not have been admissible in this case. The defense statements generally said that "I have never known Major Schelkle to ever use drugs" or "I have never seen

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[1]Appellant would agree that a specific instance of law-abidingness conduct, such as "appellant does not drive fast," would be irrelevant in a drug case.

Major Schelkle ever use drugs." These statements were simply a form of reputation evidence allowable under M.R.E. 405(a), as referenced by defense counsel. On cross-examination, the trial counsel could have asked the witnesses about specific instances of appellant using drugs (if there had been any, which there were not). M.R.E. 405(a). The military judge was also incorrect about his concern that the defense statements discussed the ultimate issue in the case. None of the statements told the court-members that the witness believed appellant did not use drugs between 28 March and 28 April, or that appellant was telling the truth when he testified that he did not use drugs. The concern of the military judge was unwarranted. The military judge was also incorrect opining that in an assault case it would be irrelevant for a witness to testify that he or she had never seen the accused assault anyone. Such evidence of "peacefulness" would clearly be admissible and would be a pertinent character trait. Stating that one had never seen the accused assault anyone or ever become angry is a form of peacefulness testimony. *See United States v. Giles,* 13 M.J. 669 (A.F.C.M.R. 1982). What the rules may not allow in such a case is for a witness to then be allowed to go into specific instances where the accused did not "pick a fight."[2] Similarly, the military judge was mistaken with his "drunk driving" example. It would certainly be relevant that the accused had a reputation for not "drinking or driving" or had never been seen to drink and then drive, or was known to never drink at all! The rules of evidence should not be designed to prevent an accused from presenting such exculpatory evidence, especially in a jurisdiction where, unique to any jurisdiction, a servicemember is tried and his

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[2]Although appellant would not necessarily agree. In *Giles,* the court had simply said the military judge had not abused his discretion in not allowing the defense to go into specific instances of the accused's peacefulness.

freedom taken away based on what a machine measures. *Chambers, supra.*

The redacted defense statements became more relevant as the trial progressed. As noted, defense counsel in her opening statement put the judge on notice that appellant was going to testify in his own behalf. After the prosecution rested, the defense called as its first witness SA Glick. She testified that appellant was shocked when he was called in to be interviewed by OSI. (R. 284). She stated appellant had said "I don't mess around with drugs. I can't believe this, this is a nightmare." (R. 285). He voluntarily consented to a search of his vehicle and his home. (R. 285, 286). In her opinion, his car did not smell as if marijuana had been smoked in it. (R. 286). Major Schelkle then testified. He provided the court-members with his normal daily routine. (R. 295–298). He denied using marijuana during March of 1993 and testified that he had never used marijuana. (R. 299). However, he could not explain how his sample tested positive. (R. 300).

On cross-examination, trial counsel thoroughly attacked appellant's credibility. (R. 308–313, 314, 315). Trial counsel also questioned appellant about whether or not he had ever smelled marijuana when he attended concerts in high school. (R. 316). During a 39a session called in the middle of his cross-examination, trial counsel noted that appellant's good military character was "a central theme of the defense." (R. 321). He wished to cross-exam the appellant about the fact that he received six "Fs" at the State University of New York in 1975 while he was taking a course to advance his military training. (R. 321). The military judge excluded the evidence under M.R.E. 403. Trial counsel then further cross-examined the appellant about the time he actually reported for the urinalysis, implying he had waited as long as he could to be tested. (R. 327, 328). Trial counsel also asked appellant

about $170.00 worth of toys he had purchased for his children in the days after he provided his urinalysis. The judge told him to "move along." (R. 331).

After appellant, Mr Bell was called as a defense witness. He was a co-worker of appellant and testified that he had not observed appellant using drugs between 28 March 1993 and 28 April 1993. He also had not noticed appellant acting strangely during that time frame. (R. 344). Mr Paul Ferrone, a neighbor of appellant, also testified that he had not seen appellant use marijuana between 28 March and 28 April. (R. 349). Mrs Schelkle testified for her husband and discussed what she and her husband had done between the charged time frame. (R. 355–360). She also testified that she had not seen her husband use any drugs during the charged time frame. (R. 360). Frances Hunt-Burrus was next to testify and also stated that she had not seen appellant use any illegal drugs during the charged time frame. (R. 374). She also provided her opinion that appellant had a character for truthfulness. (R. 375). On cross-examination, she discussed appellant's "typical day." (R. 376). Finally, Lt Colonel Balcom testified on appellant's behalf. He stated that appellant's duty performance was "fantastic" during the time appellant had worked for him (June 1992 to March 1993). (R. 380). He stated that appellant was "shocked" when he was told the results of his urinalysis and that he (Lt Col Balcom) had never seen appellant use drugs or act unusual during the charged time frame. (R. 381, 382).

Through the cross-examination of appellant and his wife, trial counsel had directly placed appellant's honesty in issue, including appellant's testimony that he had never used illegal drugs. Trial counsel also noted during a 39a session after the defense rested that appellant's credibility had been attacked on cross-examination and it was then that the defense exhibits had been admitted. (R. 395). However, appellant's credibility

was attacked *prior* to the appellant testifying, when trial counsel had called SA Kelley to testify about the statements appellant had made to him. Trial counsel used those statements against appellant during his cross-examination of appellant and during his closing argument. Defense counsel had also put the military judge on notice, during her opening statement, that appellant would be testifying. Thus, under the facts of this case, the statements redacted by the military judge were admissible at the time appellant offered them into evidence and certainly should have been admissible after the defense rested its case. *United States v. Robertson,* 39 M.J. 211 (C.M.A. 1994).

Prejudice

The error by the military judge prejudiced appellant. In *United States v. Weeks,* 20 M.J. 22 (C.M.A. 1985), the then named, Court of Military Appeals adopted a four part test to determine prejudice: (1) Is the government's case against the accused strong and conclusive? (2) Is the defense's theory of the case feeble or implausible? (3) What is the materiality of the proffered testimony? Is the question whether or not the accused was the type of person who would engage in the alleged criminal conduct fairly raised by the Government's theory or by the defense? and, (4) What is the quality of the proffered defense evidence and is there any substitute for it in the record of trial? *Weeks,* at 25.

At appellant's court-martial, the government's case rested solely on a positive urinalysis result. It was not a strong urinalysis case. Scientific tests are administered by people, and people make mistakes. In Major Schelkle's case, mistakes were made and procedures not followed. At the Brooks laboratory, urine samples tested in the same "batch" as appellant's were tested incorrectly. A blind positive was incorrectly determined to be negative. (R. 204). Since

appellant's urine sample tested positive each time, it was assumed his sample was accurately tested. But, make a mistake once with one urine sample, why not three or four times with another? Trial defense counsel extensively questioned the government's expert about the testing of tube #11. This tube was in the same batch of tested samples as appellant's[3]. The government expert testified that the "counts" of a particular urine sample, tested on two different tests, should not have deviated more than 10%. (R. 231). The "counts" taken of tube #11 on two different tests had over a 50% deviation. (R. 232). The expert witness attempted to explain that the impermissible discrepancy could have been caused by "pipetting." (R. 234). However, he agreed that it was possible the sample tested in tube #11 on 11 May 1994 did not come from the *same* urine specimen tested in tube #11 on the 14th of May (although it was supposed to be the same urine specimen). (R. 235). If so, a major error was committed. Chain of custody of this sample may have been compromised. In fact, discounting the almost "holier than thou" testimony of the expert witness as to the Brooks Laboratory's chain of custody procedures, this possibility was just as likely as any other. (R. 235).

Other discrepancies occurred in the batch of urine samples tested with appellant's sample. Tube #3 was the blind quality control sample that incorrectly tested negative in the initial test, but positive on the retest. (Pros. Ex. 7, pages 7K, 7H). Tube #5 was tested as negative in the initial immunoassay test (Pros. Ex. 7, pages 7F, 7H), negative in the retest (Pros. Ex. 7, pages 7I, 7K), but positive on the GS/MS confirmation test (Pros. Ex. 7, page 7L). Tube #5 was not a blind quality control sample. Tube #9, social security number 486–54–0020, was tested in an initial immunoassay test and a

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[3]Appellant's sample was in tube #2. (R. 232)

retest. (Pros. Ex. 7, pages 7F, 7H). However, for the third and final test, the GS/MS confirmation test, tube #9 had inexplicably disappeared. (Pros. Ex. 7, page 7L). Tube #9 was not a quality control sample. Tube #9 had tested negative in the first two tests, and presumably there was no need to test it in the final, confirmation test. Sounds good, but tube #5 also tested negative the first two times, but was tested a third time. Either the testing procedure for tube #5 or the testing procedure for tube #9 was not followed. Finally, Tube #10, not a blind quality control sample, tested negative in the initial immunoassay test (Pros. Ex. 7, pages 7I, 7K), but positive in the retest (Pros. Ex. 7, pages 7F, 7H). All of these discrepancies show that the Government's case was not overwhelming.

Appellant's excellent military character and other evidence admitted at his court-martial shows how tenuous was the Government's case. Appellant had served 14 years in the military. No derogatory evidence was introduced by the government. Three of appellant's co-workers testified about his work ethic and character. (R. 342–388). Mrs Schelkle and the three other witnesses testified that they did not see appellant use marijuana during the charged time period. None of them noticed anything unusual about appellant. (R. 342–388). Six other witness statements were admitted in the form of affidavits, all commending appellant's officership and work ethic. (Def. Exs. R-W).

Appellant was visibly shocked to find out his urine sample had tested positive. (R. 284). He fully cooperated with the AFOSI agents. (R. 248–269). He even volunteered to the agents that they could search his house. (R. 285). A search of appellant's vehicle revealed no illegal contraband or marijuana odor. (R. 286). In fact, the AFOSI found no witnesses to appellant's alleged drug use, or any other investigative leads. (R. 269). The Hanscom laboratory

personnel noticed nothing unusual about appellant's demeanor when he reported to provide his urine sample (R. 144). His commander noticed nothing unusual about his demeanor when appellant was told to report to the clinic for a random urinalysis. (R. 121). During the charged time period, appellant had not taken excessive leave or gone TDY. (R. 263, 264). During his career, appellant had submitted dozens of previous random urine samples, all of which were negative. (R. 302).

All told, the appellant's character, his demeanor during sentencing, and the testing errors committed at the laboratory, amounted to a less than overwhelming case for the Government. Appellant's theory was that either a mistake had been made in the testing procedures, or he innocently ingested marijuana. (R. 307, 405, 406). The government's case was not strong and, given the numerous mistakes that were made at the laboratory, appellant's theory of the case was not feeble or implausible. The first and second parts of the test were met. The third part of the test was also met. Appellant was adamant that he did not use marijuana. (R. 299) His performance reports were admitted into evidence. (Def. Ex. O). His wife and co-workers testified as to his character and work ethic. (R. 342–387). An AFOSI agent testified that, in her opinion, Major Schelkle was shocked when he was called in for questioning. (R. 284). The character of appellant had a large bearing in this case. In fact, other than appellant's denial, his upstanding character was his defense.

Finally, the quality of the proffered testimony was high. The defense witnesses who would have provided their knowledge of appellant's lawfulness were all co-workers (or had been) of appellant. One was an active duty Lt Colonel. Another, a retired Major. A third, a senior civilian employee. All had known appellant for years, one for his entire career in the Air Force. (Def. Exs. R-W). Because of the military

judge's ruling, Mrs Schelkle and the three defense witnesses that testified during findings were forced to give only their knowledge as to whether they had ever seen appellant use drugs during the charged time period[4]. (R. 344, 347, 381). There was no substitute in the record of trial for the information redacted from the six statements.

Despite the evidence of a positive urinalysis test, the court-members deliberated for nearly four hours. Denial of appellant's right to place into evidence the powerful first hand opinions and knowledge of these witnesses, spanning 15 years, was prejudicial.

Conclusion

Trial counsel in the case *sub judice* agreed that character evidence was admissible in drug cases. He had, through Dr Papa, planted in the minds of the court-members that appellant could test positive for marijuana on 28 April 1993 even if he did not use drugs for 30 days prior to that date. He implied that appellant was a frequent drug user. In this context, evidence that witnesses had never known appellant, in 15 years, to use drugs and had never seen appellant use drugs, was pertinent and admissible.

The statements by the defense witnesses were not specific acts of conduct on the part of appellant. The witnesses did not talk about a specific event or date. However, even if they are determined to be specific acts of

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[4]In clemency matters, trial defense counsel was of the opinion that the testimony allowed at trial was similar to the redacted parts of the affidavits. They were not. As noted, the redacted statements discussed the witnesses knowledge that they had never known appellant to have used drugs. The affidavits spanned a period of up to 14 years, appellant's entire career. The witnesses at trial only discussed their knowledge of not having seen appellant use marijuana during the charged time period.

conduct, then such testimony was admissible under M.R.E. 405(b) and 404(a)(1)(Evidence of a pertinent trait of the character of the accused offered by an accused) That pertinent character trait was that Major Schelkle was against drugs and was a law-abiding citizen in that he did not use drugs. Such evidence must be admissible, under the Sixth Amendment, in a case where a defendant can be convicted based on how a machine tests his urine, and nothing else.

Respectfully submitted,

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December 1997

APPENDIX A

UNITED STATES, Appellee,

v.

Kurt G. SCHELKLE, Major U.S. Air Force, Appellant

No. 96–0220

Crim.App. No. 31105

U.S. Court of Appeals for the Armed Forces

Argued Nov. 5, 1996

Decided Sept. 12, 1997

Accused was convicted by general court-martial, Terry J. Woodhouse, J., of single specification of wrongfully using marijuana. The United States Air Force Court of Criminal Appeals affirmed. Review was granted. The United States Court of Appeals for the Armed Forces, Cox, C.J., held that evidence that witnesses had never seen or known accused to use drugs was not admissible as evidence of character trait that was essential element of defense.

Affirmed.

Sullivan J., filed opinion concurring in result.

Effron, J., filed opinion concurring in result.

1. Military Justice ⚷ 1420

Court of Appeals for the Armed Forces reviews military judge's ruling admitting or excluding evidence for abuse of discretion.

2. Military Justice ⊶ 1027

Evidence that witnesses had never seen or known accused to use drugs was not admissible as evidence of character trait that was essential element of defense to wrongfully using marijuana. Military Rules of Evid., Rule 405(b).

3. Military Justice ⊶ 1027, 1120

Mere asserting of nonobservation of criminal conduct does not equate to reputation or opinion evidence. Military Rules of Evid., Rules 404, 405.

For Appellant: *Captain Michael L. McIntyre* (argued); *Colonel Jay L. Cohen* (on brief); *Colonel David W. Madsen* and *Lieutenant Colonel Kim L. Sheffield.*

For Appellee: *Captain Deborah M. Carr* (argued); *Colonel Jeffery T. Infelise, Lieutenant Colonel Michael J. Breslin,* and *Major John H. Kongable* (on brief); *Colonel Theodore J. Fink.*

Opinion of the Court

COX, Chief Judge:

A general court-martial comprised of members convicted appellant, contrary to his pleas, of a single specification of wrongfully using marijuana, in violation of Article 112a, Uniform Code of Military Justice, 10 USC § 912a. Sitting at Hanscom Air Force Base, Massachusetts, the court-martial sentenced appellant to dismissal from the service. The convening authority approved the sentence, and the Court of Criminal Appeals affirmed in an unpublished opinion.

The issue in this case is whether the military judge erred in redacting certain passages from a group of letters introduced on the merits by the defense to support appellant's character.[1] The redacted passages are these:

> Defense Exhibit (D.E.) R: In all my experiences with Kurt Schelkle, I've never known him to use or be in any way involved with marijuana or illegal drugs.
>
> D.E. S: I have never known Major Schelkle to use illegal drugs; in fact, I haven't even known him to excessively use alcohol.
>
> D.E. T: I have never observed or known any-thing that would have led me to believe that Major Schelkle was using or involved with any illegal substances.
>
> D.E. U: Over the years I have never known Kurt to use marijuana or any other illegal substance. On the social occasions that we've been together, he has never over-indulged in alcohol. He would usually have only two or three beers over the course of the evening. He has been very moderate in the use of alcohol.
>
> D.E. V: In all my contact with Major Schelkle, I have never known him to use or be involved in any illegal drugs. Whenever I've been in Kurt's company, I have never known him to even misuse alcohol.

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[1]We granted this issue for review:

> WHETHER THE MILITARY JUDGE ERRED, TO THE PREJUDICE OF APPELLANT, BY EXCLUDING EVIDENCE FROM DEFENSE WITNESS STATEMENTS IN WHICH EACH SAID THEY HAD NEVER SEEN OR KNOWN APPELLANT TO HAVE USED DRUGS.

> D.E. W: I have never known Major Schelkle to use or be involved in illegal drugs.

Defense counsel agreed that the references to alcohol were irrelevant to this proceeding.

Although appellant was convicted largely on the basis of a random urinalysis, a major trial dynamic—injected preemptively into the proceedings by the defense—centered around evidence of appellant's consciousness of guilt, in particular his failure, for some 5 months, to mention the accusation against him to his wife. *See* 1 C. Mueller & L. Kirkpatrick, *Federal Evidence* § 85 at 420 (2d ed. 1994); 1A Wigmore, *Evidence* § 173 at 1840 (Tillers rev. 1983). She ultimately learned of the charges from someone else, incidentally, on the eve of trial. Appellant's explanation for his secrecy apparently provided the court members a significant opportunity to evaluate his credibility.

The defense also called four character witnesses on the merits. Two of them were coworkers of appellant who were with him daily. Both praised appellant's character and work, and neither had observed him using drugs during the relevant period or sensed anything unusual about him. The third witness, a former supervisor of appellant, described his duty performance as "fantastic" and stated that he never saw appellant use drugs or behave unusually. The remaining character witness was appellant's neighbor. He socialized extensively with appellant, saw him "almost every day," believed him to be truthful, and never saw him use marijuana or act unusually during the relevant time period.

In lieu of seeking production of still more character witnesses on the merits, the defense proffered the six letters previously mentioned, which attested to appellant's good military character. Trial counsel did not object to receipt of the letters in general or to character evidence *per se,* but he

did object to the specific passages set out above.[2] Counsel argued that these were not assertions of opinion or reputation of character, as permitted by Mil.R.Evid. 404(a)(1) and 405(a), Manual for Courts-Martial, United States (1994 ed.), but of specific instances of conduct (or nonconduct), as precluded by Mil.R.Evid. 405(a).

Defense counsel never contended that these assertions constituted opinion or reputation evidence so as to be admissible under Mil.R.Evid. 405(a). Instead, he argued that the challenged passages were admissible under Mil.R.Evid. 405(b), as evidence of a character trait that is an essential element of a defense, to wit: "good military character." Thus, he argued that "specific instances of the person's conduct" were indeed admissible.

The military judge, however, "d[id] not read 405(b) the same way that the defense d[id] in this regard."[3] Neither do we.

The pertinent language from the Military Rules of Evidence is as follows:

> **Rule 404. Character evidence not admissible to prove conduct; exceptions; other crimes**
>
> (a) *Character evidence generally.* Evidence of a person's character or a trait of a person's character

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[2]This matter should have been resolved under RCM 811, Manual for Courts-Martial, United States (1995 ed.), regarding stipulations of expected testimony, rather than as an evidentiary matter. All six statements were inadmissible hearsay absent government agreement. Mil.R.Evid. 801, Manual, *supra.*

[3]The military judge further analogized the situation to a drunk-driving case. The fact that a witness had not seen an accused drive drunk in the past did not seem, to the judge, to go to the accused's character. Thus, although the judge redacted the assertions that appellant had not been observed using drugs, he received the balance of those parts of the statements that went to character.

is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion, **except:**

(1) *Character of the accused.* Evidence of a pertinent trait of the character of the accused offered by an accused, or by the prosecution to rebut the same.

* * * * * *

(b) *Other crimes, wrongs, or acts.* Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Rule 405. Methods of proving character

(a) *Reputation or opinion.* In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(b) *Specific instances of conduct.* In cases in which character or a trait of character of a person in an essential element of an offense or defense, proof may also be made of specific instances of the person's conduct.

(Emphasis added.)

[1,2] Our standard of review of a military judge's ruling admitting or excluding evidence is abuse of discretion. *United*

States v. Sullivan, 42 MJ 360, 363 (1995). Plainly, the military judge did not abuse that discretion here, as appellant's contention that his character was an "essential element" of a defense is erroneous. Good military character, law-abidingness, and the like can be "defenses" in the sense that they may tend to negate an element of an offense, such as *mens rea.* They may also tend to cast doubt on the identity element of an offense, *i.e.,* that it was the accused who committed the offense. Such evidence is not, however, the sort having elements themselves, such as an "affirmative defense." *See United States v. Berri,* 33 MJ 337, 343 (CMA 1991). Thus, the failure to observe criminal activity, or the observation of general good conduct, is not probative of an essential element of a[ ] . . . defense." Mil.R.Evid. 405(b). *See also* S. Saltzburg, L. Schinasi, & D. Schlueter, *Military Rules of Evidence Manual* 497 (3d ed. 1991), wherein it is suggested that

> Character might be an element of a defense if entrapment is claimed and the government wants to prove predisposition. Specific acts might be used in this context.

[3] The operation of Mil.R.Evid. 404 and 405, as pertains to this case, is quite plain. As all parties to the trial agreed, evidence of a pertinent trait of appellant's character offered by the defense, including good military character and law-abidingness, is admissible. Mil.R.Evid. 404(a)(1). However, the form that evidence could take was limited to reputation and opinion testimony, and the military judge fully permitted all reputation and opinion evidence here. Mil.R.Evid. 405(a). As the defense has implicitly conceded throughout, a mere assertion of nonobservation of criminal conduct does not equate to reputation or opinion evidence. *See United States v. Scarpa,* 897 F.2d 63, 70 (2d Cir. 1990); Fed.R.Evid. 405, 28 USC, Notes of Advisory Committee on

Proposed Rules; 1 S. Saltzburg, M. Martin, D. Capra, *Federal Rules of Evidence Manual* 446–66 (6th ed. 1994); *see also Michelson v. United States,* 335 U.S. 469, 69 S.Ct. 213, 93 L.Ed. 168 (1948); *United States v. Midkiff,* 15 MJ 1043, 1051 (NMCMR 1983); *United States v. Giles,* 13 MJ 669, 671 (AFCMR 1982).

In the instant case, moreover, the military judge expressly ruled that the live witnesses *could* be asked about appellant's conduct during the charged period, and the witnesses so testified. Furthermore, it can be fairly assumed that the senior panel of military officers would have well realized that none of the many servicemembers who came forward to present evidence on behalf of appellant, either in the form of live testimony or written letter, would have held a high opinion of appellant's character or performance if they had ever observed him using drugs or acting suspiciously in that regard. Thus, in reality, the type of information appellant sought to place before the members was abundantly evident.

Additionally, no evidence was presented, express or implied, regarding any other instances of criminal activity or misconduct by appellant, either within or without the charged period.[4] Lastly, the excluded evidence was cumulative and at best marginally relevant. *See United States v. Hill,* 40 F.3d

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[4]Appellant now complains that the prosecution, through its drug expert, implied that appellant may have used drugs prior to the charged period, and thus the defense should have been allowed to present the evidence of nonobservation of prior drug use. Those portions of the drug expert's testimony in question, however, were part of a series of questions about the general characteristics of marijuana usage *vis-a-vis* the persistence of the tetrahydrocannabinol metabolite in urine. For example, the expert was asked:

> Assuming for hypothetical purposes that the accused used marijuana on a regular basis and stopped on the 29th of March 1993. Could the result in this test be consistent with such behavior?

164 (7th Cir. 1994) (defendant's failure to steal three "test letters" was "only tangentially relevant" to whether she intended to embezzle check 5 months earlier).

The decision of the United States Air Force Court of Criminal Appeals is affirmed.

Judges CRAWFORD and GIERKE concur.

SULLIVAN, Judge (concurring in the result):

I disagree with the majority's statement that "[t]he operation of Mil.R.Evid. 404 and 405, [*infra*] as pertains to this case, is quite plain." 47 MJ at 112. On the contrary, the operation of these rules in general and in this case in particular is anything but plain.* *See Government of the Virgin Islands v. Grant,* 775 F.2d 508, 511–12 (3d Cir. 1985). Moreover, the prosecution did not object to the excluded evidence on hearsay grounds and, therefore, the majority cannot now support its opinion on that basis. I would affirm appellant's conviction, but not for the reasons posited by the majority.

A critical factor in the majority's analysis is that "the defense has implicitly conceded throughout [that] a mere assertion of nonobservation of criminal conduct does not equate to reputation or opinion evidence." 47 MJ at 112. I note, however, that appellant defense counsel has not conceded this issue at all. He states:

> The expert agreed that it was possible. The defense did not object to this testimony, and, in the context in which it was given, it cannot possibly be construed as evidence or innuendo that the expert was of the opinion or had a basis for believing that appellant previously used drugs.

*Apparently this issue was not plain to the military judge who initially admitted these statements and then excluded them at a later date. He then allowed defense-character witnesses who actually testified to give similar testimony on non-use by appellant during the charged period.

> The statements by the defense witnesses were not specific acts of conduct on the part of appellant. The witnesses did not talk about a specific event or date. However, if they are determined by this Honorable Court to be specific acts of conduct, then such testimony was admissible under M.R.E. 405(b) and 404(a)(1). . . .

Final Brief at 21.

Moreover, I read the excluded evidence more broadly than the majority does. The particular statements excised by the military judge are noted in the majority opinion. 47 MJ at 110, 111. A fair reading of them suggests that these witnesses were substantially giving their opinion that appellant did not use drugs. *See United States v. Breeding,* 44 MJ 345, 350 (1996) ("Reputation is what the witnesses have heard about appellant . . . whereas opinion evidence relates to their own personal observations and experiences with appellant. . . .") In addition, such testimony can be reasonably considered akin to reputation evidence. *See* Wright and Graham, 22 *Federal Practice and Procedure* § 5266 at 598; *contra Virgin Islands v. Grant, supra.* Even if these statements by the defense witnesses are literally construed, evidence of specific non-acts is not plainly barred by Mil.R.Evid. 405(b), Manual for Courts-Martial, United States, 1984 (specific instances of the person's conduct). *See Virgin Islands v. Grant, supra* at 512.

In any event, evidence of "specific instances of conduct" is admissible where "character or a trait of character . . . is an *essential element of an offense or defense.*" Mil.R.Evid. 405(b) (emphasis added). Here, appellant was found guilty of a single specification of wrongfully and knowingly using marijuana under Article 112a, Uniform Code of Military Justice, 10 USC § 912a, on the basis of positive urinalysis evidence. *See generally United States v. Harper,* 22 MJ 157 (CMA 1986). In my view, the uniqueness of this type of

prosecution entitled appellant to present evidence that those familiar with him have not observed him using drugs, and such evidence should be considered essential in these urinalysis cases. *Cf. United States v. Keiser,* 57 F.3d 847, 857 (9th Cir. 1995); *United States v. Swanson,* 9 F.3d 1354, 1359 (8th Cir. 1993) (strictly construing Fed.R.Evid. 405(b) to require more than relevance to defense). After all, we have held that evidence of a servicemember's religious opposition to drugs is admissible at a court-martial to create a reasonable doubt about drug use. *See United States v. Brown,* 41 MJ 1 (CMA 1994).

I disagree with the majority that the form of excluded evidence precluded the defense from presenting it to the members. *See also United States v. Rankins,* 34 MJ 326, 336 (CMA 1992) (Sullivan, C.J., dissenting) ("defense . . . was not a strong one, but it *was* her *only* one"). Nevertheless, in view of the testimony from the actual witnesses who were permitted to testify at trial concerning non-use, I am convinced this error by the military judge was harmless beyond a reasonable doubt. *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Accordingly, I join my fellow judges in affirming appellant's conviction.

EFFRON, Judge (concurring in the result):

Appellant was convicted of wrongful use of marijuana "between on or about 28 March 1993 and on or about 28 April 1993," in violation of Article 112a, Uniform Code of Military Justice, 10 USC § 912a. To obtain a conviction for drug use, the Government was required to prove that appellant had "[k]nowledge of the presence of" marijuana. *See also* para. 37c(10), Part IV, Manual for Courts-Martial, United States (1995 ed.) (effective January 21, 1994).

The Government had no direct evidence that appellant knew he had consumed marijuana. No witness had ever seen him use, possess, or exhibit the effects of marijuana before,

during, or after the charged period of use. The Government's only significant evidence was a positive urinalysis result. Under applicable law, the Government relied on a permissive inference that "[k]nowledge of the presence of the controlled substance may be inferred from the presence of the controlled substance in the accused's body. . . ." *Id.*

Appellant sought to rebut the inference of knowing use by introducing statements of others that they had not seen him use marijuana. The military judge permitted witnesses to testify as to non-use during the charged period. He refused to permit appellant to introduce evidence of non-use contained in written statements covering a longer period of time, however, even though defense counsel specifically contended that, among other grounds for admissibility, such evidence was "consistent with the defense which we've asserted of unknowing [ingestion] and the element of the offense of knowledge."

The military judge relied on Mil.R.Evid. 405(b), Manual, *supra,* for the proposition that the evidence offered by appellant constituted evidence of his good military character and law-abiding behavior, which can be proved only through opinion and reputation testimony and not through specific instances of conduct. As illustrated in the material quoted by Judge Sullivan from *Government of the Virgin Islands v. Grant,* 775 F.2d 508, 511–12 (3rd Cir. 1985), there is considerable debate concerning whether testimony as to the absence of specific instances of conduct constitutes opinion testimony or whether it constitutes multiple instances of good conduct.

In a urinalysis case, where the only evidence of use is a laboratory report, it is difficult to discern the difference between opinion testimony that an individual is drug-free and testimony that the witness has never observed the individual use drugs. I would not foreclose the contention, if clearly

litigated, that the best means of communicating an opinion that a person is drug-free is through testimony that the witness has never observed the individual use drugs.

In addition, I also would not foreclose the contention that evidence of non-use, even if treated as multiple incidents of conduct, is admissible under Mil.R.Evid. 404(b) in a urinalysis case to rebut the inference that mere presence of a metabolite in the urine proves knowing use. Mil.R.Ed. 404(b) permits introduction of evidence of "other . . . acts," not as evidence of character but as "proof of motive, opportunity, intent, preparation, plan, *knowledge*, identity, or absence of mistake or accident. . . ." (Emphasis added.) Extrinsic evidence of conduct frequently is admitted to prove a person's state of mind. *E.g., United States v. Dorsey*, 38 MJ 244 (CMA 1993) (evidence of uncharged misconduct admissible to prove intent). In a urinalysis case, where the Government cannot prove use on any particular date and has no direct evidence of knowing use, an accused may have a strong argument that evidence of non-use is admissible as extrinsic evidence on the issue of knowledge.

I agree with the majority, however, that in the case before us, any error is harmless in view of the considerable live testimony that was admitted by the military judge as direct evidence of non-use.

APPENDIX B

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES

v

Major KURT G. SCHELKLE, 054–50–3041
United States Air Force

ACM 31105

26 September 1995

Sentence adjudged 10 November 1993 by GCM convened at Hanscom Air Force Base, Massachusetts, Military Judge: Terry J. Woodhouse.

Approved sentence: Dismissal.

Appellate Counsel for Appellant: Colonel Jay L. Cohen, Captain Joel R. Reifman, and Captain Michael L. McIntyre.

Appellate Counsel for the United States: Colonel Jeffery T. Infelise, Colonel Thomas E. Schlegel, Lieutenant Colonel Joseph J. Urban, and Major John H. Kongable.

Before

HEIMBURG, GAMBOA, and SENANDER
Appellate Military Judges

OPINION OF THE COURT

SENANDER, Judge:

In a general court-martial, tried before members, the appellant was convicted, contrary to his pleas, of wrongful use of marijuana. Article 112a, UCMJ, 10 U.S.C. § 912a. His approved sentence is a dismissal. The appellant assigned two errors. We find neither persuasive, and affirm.

The appellant provided a urine sample, pursuant to a random urine test, on 28 April 1993. On 1 June 1993, he was notified by the Air Force Office of Special Investigations (AFOSI) that his sample had tested positive. Dr. Vincent M. Papa, an expert in forensic toxicology, testified concerning the testing procedures used on the appellant's urine sample at the Armstrong Laboratory Drug Testing Division, Brooks Air Force Base, Texas. He explained that testing of appellant's sample revealed the presence of marijuana metabolite at a level of 43.74 ng/ml, which was above the Department of Defense standard of 15 ng/ml for reporting positive results. During his testimony, Dr. Papa admitted that other samples in the same batch as appellant's revealed discrepancies in results between tests. As a result of the discrepancies, appellant's sample, as well as the other samples in the same batch, were tested a fourth time. Dr. Papa testified there were no discrepancies in appellant's urine sample results, and that discrepancies in other samples were caught by the laboratory.

In his first assignment of error, the appellant asserts the military judge erred by excluding portions of six character statements. Each statement was admitted to show the appellants reputation for good military character and truthfulness. One sentence in each statement that stated the individual had never known the appellant to use or be involved in any illegal drugs was deleted by the military judge upon objection by trial counsel. The military judge properly excluded those portions of the statements that were neither

reputation or opinion evidence. Mil.R.Evid. 405, MCM, Part III (1984). The standard by which we review a military judge's decision concerning the admissibility of evidence is an abuse of discretion standard. *United States v. Spata,* 34 M.J. 247 (C.M.A. 1992). We conclude the military judge had a valid basis for partially excluding the statements of the six witnesses and that he did not abuse his discretion.

The appellant next asserts the evidence was factually insufficient to support his conviction. It is the responsibility of this Court to review a case for both factual and legal sufficiency. Article 66(c), UCMJ, 10 U.S.C. § 866(c), *United States v. Turner,* 25 M.J. 324 (C.M.A. 1987).

At trial the appellant did not challenge the collection process, but did point out that other samples tested in the same batch resulted in discrepancies. There was testimony from Dr. Papa that the discrepancies were not related to the appellant's sample. The appellant testified that he did not know how the marijuana metabolite could have been in his urine sample. He appeared shocked when confronted with the positive test results. He cooperated with AFOSI and agreed to a search of his vehicle and home. He did ask that his wife not be told about the test results since she was pregnant. The AFOSI searched his vehicle and found nothing and did not search the house in deference to his pregnant wife. In fact, the appellant did not tell his wife about the positive urinalysis; she found out a week before trial when a potential witness called to discuss the matter. The appellant's wife delivered their baby six weeks prior to trial. During appellant's testimony he was able to recall in detail the process of collecting urine samples, but on cross examination claimed he could not remember any events from the time he was notified until after he provided a urine sample over two hours later. He did admit he drank water and coffee during the time between notification and providing the urine sample.

The prosecution provided no evidence, other than the positive urinalysis, to prove the appellant's knowing use, but the members could conclude from that evidence that there was knowing use of marijuana. There is a permissive inference of wrongfulness, including knowledge, which can be drawn from proof of presence of the drug's constituent elements in a person's urine. *United States v. Pabon,* 42 M.J. 404 (1995); *United States v. Ford,* 23 M.J. 331, 336 (C.M.A. 1987); *United States v. Harper,* 22 M.J. 157 (C.M.A. 1986). There was sufficient evidence for the court members to conclude beyond a reasonable doubt that the appellant knowingly used marijuana. We are also convinced by the evidence that the appellant is guilty beyond a reasonable doubt of knowingly using marijuana. We conclude that the findings and the sentence are correct in law and fact, the sentence is not inappropriate, and no error prejudicial to the substantial rights of the appellant was committed.

Accordingly, the findings of guilty and the sentence are correct in law and fact and are

AFFIRMED.

Senior Judge HEIMBURG and Judge GAMBOA concur.

OFFICIAL

ALVIN J. STRIBLING
Technical Sergeant, USAF
Chief Court Administrator